IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 615

RALPH BERGER,

*Petitioner,*

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

## BRIEF AND MOTION OF NEW YORK CIVIL LIBERTIES UNION, *AMICUS CURIAE*

JOHN J. McAVOY
14 Wall Street
New York, New York 10005
*Attorney for New York Civil Liberties Union, Amicus Curiae*

ALAN H. LEVINE
*Of Counsel*

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## BRIEF AND MOTION OF NEW YORK CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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### Interest of *Amicus*

The New York Civil Liberties Union, an affiliate of the American Civil Liberties Union, is a nonpartisan organization devoted solely to protecting those constitutional rights and liberties which are essential to our society's basic framework of ordered liberty.

Foremost among those rights are the rights of privacy and free speech. The Union's interest in the present case[1] arises from the belief that the installation of secret microphones through trespass by the police upon private prop-

[1] Petitioner and respondent have consented to the filing of a brief *Amicus Curiae* by the Union in the present case.

erty, even if done in conformity with New York's statute which purports to authorize police eavesdropping pursuant to Court order, violated the petitioner's constitutional rights of freedom of speech, freedom from illegal search and seizure and the privilege against self-incrimination.

The various means of secret surveillance which modern science has provided the police and other parts of Government require constitutional interpretations that will adequately protect the citizen against improper uses of these new methods for invading individual privacy.

The dangers secret surveillance devices present to a free society give the New York Civil Liberties Union vital concern for the Court's ruling on the legal issues presented by the facts of this case.

## Statement of Facts

Petitioner, Ralph Berger, was convicted of two conspiracies to bribe the Chairman of the New York State Liquor Authority. The indictment, naming only petitioner, contained two counts. Each alleged a conspiracy to bribe in connection with a liquor license for a different club to be opened in New York City.

The convictions were affirmed by the Appellate Division and the Court of Appeals without opinions. The affirmance of the conviction by the Court of Appeals appears at 18 N. Y. 2d 638, with Chief Judge Desmond and Judge Fuld dissenting (R. 691).

All of the evidence offered at trial was obtained, directly or indirectly (by "leads") through the use of two eaves-

dropping devices. (Stipulation of counsel at hearing upon petitioner's motion to suppress, R. 47.)

The first of these devices (hereafter the Neyer eavesdrop) was installed in the office of Harry Neyer, an attorney, in April 1962, pursuant to an order dated April 13, 1962. The issuance of that order was based upon the affidavits of two assistant district attorneys for New York County, Mr. Alfred J. Scotti and Mr. Jeremiah B. McKenna, sworn to on April 5, 1962.

Mr. Scotti's affidavit (R. 683) merely asserts that:

> "Based upon the facts set forth in Mr. McKenna's affidavit, I respectfully state to the Court my opinion that there is reasonable ground to believe that evidence of crime may be obtained by . . . [the eavesdrop for which the order is sought]."

Mr. McKenna's affidavit provided only slightly more information to the Justice from whom the order was sought. That affidavit stated that the Rackets Bureau of the District Attorney's office, in an investigation into alleged official corruption centered about the State Liquor Authority

> "*has evidence* that one of the attorneys who acts as the conduit for these . . . payments is Harry Neyer . . . According to the *information in the possession of this office,* other attorneys or applicant licensees must retain Harry Neyer to contact the Liquor Authority on their behalf and carry the bribe or extortion money . . .

"In view of the foregoing, there is reasonable ground to believe that evidence of crime may be obtained by [the eavesdrop for which the order is sought]." (Emphasis added.)

Neither affidavit mentioned petitioner.[1a]

During April and May of 1962 conversations taking place in Mr. Neyer's office were overheard by the police, and some were recorded (R. 29).[2]

Presumably because of matters heard through the Neyer eavesdrop,[3] the Rackets Bureau determined that it should eavesdrop on conversations in the office of one Harry Steinman. On June 11, 1962 application was made for an order for this second eavesdrop (hereafter the Steinman eavesdrop). The application again was supported by two affidavits, one by Mr. Scotti and the other by Mr. David A. Goldstein. Mr. Scotti's affidavit merely con-

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[1a] Though the justice who signed the order had no information beyond that set forth above, counsel for respondent, in argument at the hearing on petitioner's motion to suppress the evidence obtained by the eavesdropping, explained that the decision to apply for an eavesdropping order was based on two recordings secretly made of conversations between a license applicant and Mr. Neyer, and a third recording, of a conversation between the applicant and a clerk of the Chairman of the State Liquor Authority (R. 22-25).

[2] The Court refused to permit petitioner's counsel to go into the circumstances of the installation of this device (R. 300-302), presumably on the ground that only leads for evidence used at trial were obtained by this eavesdrop, rather than (as with the second eavesdrop) evidence actually used at trial.

[3] By its terms, the first Neyer eavesdrop order authorized eavesdropping for 60 days, until June 11, 1962. Later orders authorized the continuation of this eavesdrop. Neither the order extending this eavesdrop nor those extending the Steinman eavesdrop affect the issues before this Court. Though referred to in the record on review (R. 23), they are not set forth there.

tained references to Mr. Goldstein's affidavit and a recital of Mr. Scotti's opinion that there was "reasonable ground to believe that evidence of crime" might be obtained by the eavesdrop for which the order was sought (R. 688). Mr. Goldstein's affidavit averred that "This office has received information," "has obtained evidence," and "presently has evidence" of certain criminal conduct by Mr. Neyer or Mr. Steinman. The affidavit then continues:

> "[O]ver a duly authorized eavesdropping device installed in the office of . . . Harry Neyer, evidence has been obtained that conferences relative to the payment of unlawful fees necessary to obtain liquor licenses occur in the office of one Harry Steinman . . .
>
> "The evidence indicates that the said Harry Steinman has agreed to pay, through the aforesaid Harry Neyer, $30,000 . . . to secure a liquor license . . . .
>
> "In view of the foregoing, there is reasonable ground to believe that evidence of crime may be obtained [by the eavesdrop for which the order is sought.]" (R. 686)

Again, neither affidavit mentioned the petitioner. Based on these affidavits the order was issued (R. 684).

The device which this second order purported to authorize was installed in the early morning hours of June 16, 1962 (R. 295), presumably without the permission of Mr. Steinman, in his office on the eighth floor of an office building in New York City (R. 309). The microphone was placed on the wall behind a desk. It was concealed behind a cover commonly used by those who install telephones to connect telephone extensions and to provide new or

additional outlets for telephones. The microphone then was connected to unused telephone wires previously installed by the telephone company to provide regular service to the office.[4] The unused telephone wires led to the basement of an adjoining building where, two days later, the police established a "listening post" by attaching a recording device, and the battery which activated the microphone.

Upon the expiration of the initial Steinman eavesdrop order on August 11, 1962, additional orders were obtained to extend the time period for this eavesdropping (R. 23).

By these devices the evidence was obtained which was used against the petitioner.[5]

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[4] These were the extra wires contained in the regular telephone cables used to service the telephone in the office of Mr. Steinman. Nearly every telephone in every home and office in the nation is installed with cables which have these extra wires, and has one or more such connector plates which could be used in the installation of the kind of eavesdropping device used here.

[5] Orders for other eavesdropping also were obtained during the course of this investigation. Though the record does not establish just how many orders were issued, it does show that an order, dated July 19, 1962, authorized the installation of a secret eavesdrop contrivance in the hospital room of an official of New York's State Liquor Authority (R. 12, 17-18). Respondent's trial counsel stated that this hospital room eavesdrop did not provide evidence produced at trial. He was "unable", however, to state definitely that the Grand Jury which indicted petitioner had not heard such evidence (R. 43).

## Summary of Argument

1. The orders under which the petitioner's and others' conversations were heard were constitutionally defective in that the magistrate who issued the orders was provided with no "facts or circumstances" upon which to base a decision whether probable cause existed. *Aguilar* v. *Texas,* 378 U. S. 108 (1964); *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920).

2. The orders authorized seizure of testimonial materials of evidentiary value only, in violation of the Fourth and Fifth Amendments; *Boyd* v. *United States,* 116 U. S. 616 (1886); *Silverman* v. *United States,* 365 U. S. 505 (1961).

3. The orders failed to "particularly describe . . . the . . . things to be seized." In effect, the officers wielded general search warrants. *Marron* v. *United States,* 275 U. S. 192 (1927); *Stanford* v. *Texas,* 379 U. S. 476 (1965).

4. The eavesdropping authorized by New York's statute impairs petitioner's exercise of First Amendment rights. *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). Private speech is burdened by a statute which permits authorities to use secret listening devices without showing a necessity based on vital interests of the State. *Shelton* v. *Tucker,* 364 U. S. 479 (1960). The goal of routine law enforcement, the asserted basis for this restriction on speech, cannot be sought by means which inhibit free speech if it is attainable by noninhibitory means. *Talley* v. *California,* 362 U. S. 60 (1960).

## ARGUMENT

### I.

**Eavesdropping pursuant to Section 813-a, Code of Criminal Procedure, violated the petitioner's rights to freedom from unlawful search and seizure[6] and to remain silent.**

Eavesdropping accomplished through trespass, if done without prior authorization by a court, violates the Fourth Amendment. *Silverman* v. *United States,* 365 U. S. 505 (1961); *Clinton* v. *Virginia,* 377 U. S. 158 (1964).

The prior authorization by a court to conduct such eavesdropping, whether that authorization is called an order or a warrant, must meet the requirements of the Fourth Amendment for search warrants. To do less would permit the requirements of the Fourth Amendment as to warrants to be disregarded while police invade the privacy of a home, office, or hotel room. And, " . . . [it is] privacy which the Fourth Amendment protects." *Jones* v. *United States,* 362 U. S. 257, 273 (1960) (dissent of Douglas, J.).

As the late Judge Frank observed:

> "[J]ust as looking around a room is searching, listening to the sounds in a room is searching. Seeing and hearing are both reactions of a human being to the physical environment around him—to light waves in one in-

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[6] "It is now settled that the fundamental protections of the Fourth Amendment are guaranteed by the Fourteenth Amendment against invasion by the States." *Stanford* v. *Texas,* 379 U. S. 476, 481 (1965). Evidence obtained in violation of the Fourth Amendment rights of petitioner is not admissible against him. *Mapp* v. *Ohio,* 367 U. S. 643 (1961); *Ker* v. *California,* 374 U. S. 23 (1963).

> stance, to sound waves in the other. And, accordingly, using a mechanical aid to either seeing or hearing is also a form of searching. The camera and dictaphone both do the work of the end-organs of an individual human searcher—more accurately." *United States* v. *On Lee,* 193 F. 2d 306, 313 (2nd Cir. 1951) (dissenting opinion).

One of the questions this case presents is how the Fourth Amendment precepts can be applied to the use of these new devices.

> "To be secure against police officers' breaking and entering to search for physical objects is worth very little if there is no security against the officers' using secret recording devices to purloin words spoken in confidence within the four walls of home or office. Our possessions are of little value compared to our personalities." *Lopez* v. *United States,* 373 U. S. 427, 469 (1963) (dissent of Brennan, J.).

There follows a consideration of three of the major requirements imposed by the Fourth Amendment (one of which relates also to the Fifth Amendment), and their application to orders for eavesdropping to obtain evidence.

**a. *The Orders Were Issued Without Probable Cause.***

Certain of the mandates of the Fourth Amendment are difficult to apply to an eavesdrop order—but the requirement of probable cause is not.

Section 813-a of New York's Code of Criminal Procedure by its terms purports to authorize the issuance of an *ex parte* order for eavesdropping of the kind done in this case "upon oath or affirmation . . . that there is *reasonable ground to believe* that evidence of crime may be

thus obtained . . . , and particularly describing the person or persons whose communications are to be intercepted, overheard or recorded and the purposes thereof." (Emphasis added.) The New York courts have equated "reasonable grounds to believe" to the constitutional requirement of "probable cause," *People* v. *McCall*, 17 N. Y. 2d 152, 157 (1966); *People* v. *Marshall*, 13 N. Y. 2d 28, 34 (1963), as has this Court in interpreting federal legislation. *Draper* v. *United States*, 358 U. S. 307, 310 n. 3 (1959).

Of necessity, therefore, the probable cause requirements of the Fourth Amendment must be met if the order may (arguably) constitutionally authorize eavesdropping ("searching") through trespass.[7]

> "Under the Fourth Amendment an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from the facts or circumstances presented to him under oath or affirmation." *Nathanson* v. *United States*, 290 U. S. 41, 47 (1933).

"Probable cause exists if the facts and circumstances . . . warrant a prudent man in believing that the offense has been committed." *Henry* v. *United States*, 361 U. S. 98, 102 (1959).

Neither the affidavit of Mr. McKenna (in the application for the Neyer eavesdrop) or Mr. Goldstein (in the application for the Steinman eavesdrop) provided sufficient "facts and circumstances" to establish probable cause

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[7] And, as has already been mentioned, to interpret the New York eavesdrop statute to require less would create a constitutional infirmity in the statute.

for the issuance of the order. Any doubt about this failure of the affidavits to meet the constitutional requirement may be eliminated by comparing either of them with the affidavit this Court found insufficient in *Aguilar* v. *Texas*, 378 U. S. 108 (1964). In that case the affidavit in support of an application for a search warrant stated:

> "Affiants have received reliable information from a credible person and do believe that herein . . . and other narcotics and narcotic paraphernalia [unlawfully] are being kept at [described premise]." *Id.* at 109.

This Court held that the affidavit did not establish probable cause for the issuance of the warrant, and in explanation stated:

> "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded . . . [a crime was being committed]. Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime.' *Giordenello* v. *United States, supra* at 486; *Johnson* v. *United States,* at 14 . . ." 378 U. S. at 114-115. (Footnote omitted.)

Despite the boast of Mr. McKenna's affidavit that the Rackets Bureau "has evidence" or "information", this affidavit is far more deficient in showing probable cause than the one found wanting in *Aguilar*. The affidavit provides no information about the nature of the "evidence" re-

ferred to. It fails to indicate whether Mr. McKenna had knowledge of the information allegedly "in the possession of" his office, and declines to outline even in the barest form what that information is. If one cuts through the affidavit's mire of evasive language the affidavit is exposed as a reiteration of completely unsupported accusations, with no statement of the facts and circumstances, either within the affiant's personal knowledge or obtained from sources established as reliable, from which one could deduce that the accusations were true. Probable cause is not so perfunctorily shown. The requirement of probable cause is imposed

> "so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy may be invaded." *Jones* v. *United States,* 362 U. S. 257, 270-271 (1960).

> "The . . . [issuing officer] must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion. . . ." *Giordenello* v. *United States,* 357 U. S. 480, 486 (1956).

Here there was no such judicial weighing of the evidence before the police were authorized to invade the privacy of this defendant and others whose conversations were overheard. The state must not be permitted to use the evidence obtained in violation of this Constitutional mandate.

The affidavit of Mr. Goldstein in support of the Steinman eavesdrop also failed to set forth evidence from which

the Court might independently evaluate its accusations. The affidavit attempts to satisfy the requirement of facts by providing summary accusatory statements preceded by the word "evidence" or "information." In *United States* v. *Ventresca*, 380 U. S. 102 (1965) this Court upheld an affidavit against a challenge that it failed to show probable cause for the issuance of a warrant. The Court's opinion implied that the affidavit there considered reached the outer limits for permissible lack of details and barely met the requirement of reliability as to the sources of the asserted facts. The affidavit in *Ventresca* was both far more detailed factually, and more adequately established the reliability of the sources of information, than does the affidavit of Mr. Goldstein. Though not technically perfect, the affidavit in *Ventresca* provided a factual basis for the magistrate to draw his own conclusion about the probability of the commission of a crime. Mr. Goldstein's affidavit provided few facts and no certainty of reliability. Though Mr. Goldstein's affidavit is more prolix than the affidavit this Court rejected out of hand in *Riggan* v. *Virginia*, 384 U. S. 152 (1966) it provides very little more information than the affidavit in *Riggan*.

Mr. Goldstein's affidavit makes clear, however, that at least some of the "evidence" submitted in support of the application was obtained by the previous eavesdrop in the law offices of Mr. Neyer, and counsel for respondent have since asserted that the Steinman eavesdrop was indeed obtained on the information derived from the Neyer eavesdrop. (Respondent's Brief in opposition to Petition, p. 6.) Because the Neyer eavesdrop was in violation of the Fourth Amendment, evidence obtained by the Steinman eavesdrop necessarily was "fruit of the poisonous

tree," *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 391-392 (1920), and barred by the Fourth Amendment from admission in evidence.

The exclusionary rules which are applied to evidence obtained by seizures made under warrants issued without probable cause are not enforced because the evidence is untrustworthy. They are enforced to obtain compliance with the Constitutional mandate. To require that petitioner have an interest in the Neyer premises before he would have standing to object to an eavesdrop which resulted in evidence used to obtain the Steinman order would place a priority on duplicity by law enforcement officials.[8] As this Court said in *Nardone* v. *United States,* 308 U. S. 338, 340 (1939),

> "To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty' "[9]

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[8] Under this kind of scheme, the first eavesdrop order could be obtained from an accommodating magistrate without a showing of probable cause, and officials would be secure that the person ultimately prosecuted would have no standing to contest that eavesdrop. The police then would use the information obtained in this first eavesdrop to make a showing of probable cause for the second eavesdrop order. Only the evidence obtained by the second, "valid," eavesdrop would be used in subsequent prosecution. To require petitioner to have an "interest" in the Neyer premises would place this Court's imprimatur on such a two-stage evasion of Constitutional requirements.

[9] Further, the Constitutional requirement of particularized description, discussed at 1(c), below, would bar this derivative use of information obtained by eavesdrop.

**b. *The Orders Authorized Eavesdropping Solely for Purposes of Obtaining Testimonial Evidence of Crime, Which Is Prohibited by the Fourth and Fifth Amendments to the United States Constitution.***

A search warrant cannot be used solely to gather testimonial evidence. "In this regard the Fourth and Fifth Amendments run almost into each other." *Boyd* v. *United States,* 116 U. S. 616, 630 (1886); *Gouled* v. *United States,* 255 U. S. 298 (1921).

This presents special problems for the orders considered here, which authorize the installation of secret microphones to overhear and record conversations expressly and solely to obtain "evidence of crime." The statute under which the orders were issued is similarly plagued with an express statement that the eavesdropping it purports to authorize may be undertaken only upon a showing that "evidence of crime may be then obtained . . . ."[10]

Though prior understandings of earlier decisions relating to the exclusion of mere evidence from material permissibly seizable are being refined by this Court, *Schmerber* v. *California,* 384 U. S. 757 (1966); *Warden* v. *Hayden,* No. 480 October 1966 Term, reviewing *Hayden* v. *Warden,* 363 F. 2d 647 (4th Cir. 1966), the Fifth Amendment privilege applies to the present recordings of conversations between the defendant and others. As was said in *Schmer-*

[10] Respondent argues that because the petitioner was convicted of conspiracy, the words seized were more than "mere evidence." (Brief in Opposition to Petition, p. 38.) This reliance on the results of the improper search completely misapprehends the basis for constitutional procedural protections. Just as an arrest is not justified by what an ensuing search discloses, *Johnson* v. *United States,* 333 U. S. 10, 16-17 (1948); *Henry* v. *United States,* 361 U. S. 98 (1959), so also a search warrant (or eavesdropping order) issued *solely* to gather evidence cannot be cured of that defect by the results of the search.

*ber,* the privilege protects an accused from providing the State "with evidence of a testimonial or communicative kind" (384 U. S. at 761). Thus, even if the Fifth Amendment does not bar the seizure of clothing or blood, it does bar the seizure of conversations as much as it bars the seizure of private papers.

The real aim of the *Boyd-Gouled* doctrine preventing searches for "mere evidence" is the search itself. "[L]imitations upon the fruit to be gathered tend to limit the quest itself," said Judge Learned Hand in *United States* v. *Poller,* 43 F. 2d 911, 914 (2nd Cir. 1930). Eavesdropping is necessarily an all-encompassing search. The words the police wish to hear may be said in the bedroom or bath, office or elevator, at noon or midnight. Even if the State is entitled to those words, however, "They cannot be reached, except by a thorough search of all that the offender has [or says], to allow which would be to countenance exactly what the [Fourth] Amendment was designed to prevent." *United States* v. *Kirschenblatt,* 16 F. 2d 202, 204 (2nd Cir. 1926). (Learned Hand, J.)

The present case differs in its Fourth and Fifth Amendment implications from *On Lee* v. *United States,* 343 U. S. 747 (1952); *Lopez* v. *United States,* 373 U. S. 427 (1963); *Hoffa* v. *United States,* 385 U. S. 293 (1966), and *Osborn* v. *United States,* 385 U. S. 323 (1966). In each of those cases, the recording was achieved by a microphone carried on the body of a person known to be present, and to whom or in whose presence the persons whose conversations were recorded intended to speak. In each instance the defendant risked the disclosure of his statements by the auditors he chose. But, at least initially, the defendant determined in whom he would confide. The requirement

of a known person as a vehicle for the microphone also places a practical time limitation on the extensiveness of the search. When, as here, conversations are overheard by microphones secretly installed without the knowledge or cooperation of any party to that conversation, the "stealth and strategy" of the police reaches a different level; one "as objectionable . . . as the coerced confession and the unlawful search," *Sherman* v. *United States,* 356 U. S. 369, 372 (1958), and like those methods, must be condemned as unconstitutional.

In *Gouled* v. *United States, supra* at 304, this Court observed that the Fourth and Fifth Amendments

> "should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."

If the *On Lee-Osborn* line of cases were extended to strip the petitioner in the present case of Fourth and Fifth Amendment protections, it would result in exactly what this Court warned against in *Gouled.*

The suggestion that under *Olmstead* v. *United States,* 277 U. S. 438 (1928), not yet overruled by this Court, oral evidence never is encompassed within the protection of the Fourth Amendment (Respondent's Brief in Opposition to Petition, p. 36) ignores subsequent decisions by this Court. Since *Olmstead,* this Court, in *On Lee* v. *United States,* 343 U. S. 747 (1952), *Irvine* v. *California,* 347 U. S. 128 (1954), *Silverman* v. *United States,* 365 U. S. 505 (1961), and *Clinton* v. *Virginia,* 377 U. S. 158 (1964), has applied the Fourth Amendment to oral evidence. Those decisions

make it clear that "The Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects' ". *Wong Sun* v. *United States,* 371 U. S. 471, 485 (1963). Accord: *Hoffa* v. *United States,* 385 U. S. 293, 301 (1966).

The limitation of the Fourth Amendment to eavesdropping done by physical intrusion of the eavesdroppers or the listening device upon the "constitutional protected area," *Silverman* v. *United States, supra* at 510, which survives in these cases, should be abandoned. Devices, such as the parabolic microphone and electronic transmitter-receivers, are presently available which can overhear whispers in closed rooms, with no physical intrusion upon the "constitutionally protected area." If this distinction is continued, Constitutional rights will be made to depend on the sophistication of the means by which they are attacked and the financial resources of the law enforcement agency undertaking that attack, and not upon the interests in privacy which the Fourth Amendment seeks to protect.

Though the "physical encroachment" test should be discarded, a reversal of petitioner's conviction in the present case does not depend on the abandonment of that requirement. The areas into which both microphones were secretly installed were constitutionally protected areas. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920); *Gouled* v. *United States,* 255 U. S. 298 (1921); *Lanza* v. *New York,* 370 U. S. 139, 143 (1962).

Once the Fourth and Fifth Amendments apply, it follows that the statements overheard, which are of a testimonial and communicative nature and were seized solely for their evidentiary value, cannot be used in evidence against the petitioner.

***c. The Failure to Specifically Describe the Evidence to Be Seized Would Violate the Fourth Amendment if the Orders Constitutionally Authorized Seizure of Evidence.***

The Fourth Amendment requires that a search warrant must "particularly describ[e] the things to be seized."

Though *Amicus* has contended that an order authorizing the installation of secret microphones solely to obtain evidence of a testimonial kind is not constitutional, if the Court finds that such orders are not barred the orders presently considered nevertheless fail to meet the requirement of particularized description of the things to be seized.

The mandate for specificity in the description of the things to be seized is clear. "[This] requirement . . . prevents the seizure of one thing under a warrant describing another. As to what is to be taken, *nothing is left to the discretion of the officer executing the warrant.*" *Marron* v. *United States,* 275 U. S. 192, 196 (1927). (Emphasis added.)

All that this Court has rejected in the long history of attempts by the authorities to justify general warrants is faced again in the present case. Only the means of effecting the general search are different.

Respondents argue that there is no greater exposure by these orders than by a search warrant which designates tangible articles to be seized. This avoids three obvious points.

First, the present orders do not even in the most general terms describe the conversations to be seized. These orders sought to authorize seizure of "any and all conversations, communications, and discussions that may take place in"

the rooms in which the eavesdropping instruments were to be placed. It is difficult to imagine a more general order and one less capable of withstanding the constitutional test of specificity.

Second, our Constitution provides special status to matters relating to speech:

> "The commands of our First Amendment (as well as the prohibitions of the Fourth and Fifth) reflect the teachings of *Entick* v. *Carrington, supra* [19 How. St. Tr. 1029 (1765)]. These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well'" *Frank* v. *Maryland,* 359 U. S. 360, 376 (1959) dissent by Douglas, J., quoted in *Stanford* v. *Texas,* 379 U. S. 476, 484-5 (1965).

Third, a secretly installed microphone necessarily "searches through" every conversation had within its range. It is inherently indiscriminate. In the present case, the police overheard and were not barred except by their own sense of discretion from reporting conversations between Mr. Neyer, an attorney, and all clients who conferred with him in his office during the period of that eavesdrop. The number of innocent persons that are necessarily stripped of privacy in their communications by the net of wiretapping requires special sensitivity to the mandates of the Fourth Amendment, including specificity; and if the means of searching for what may be taken is inherently violative of the interests the Amendment is to protect, that means will not be available to law enforcement authorities.

The orders and New York Statute seek to authorize the search for evidence for a two month period. This failure to limit the time period within which these eavesdrops may be made exacerbates the failure to "specifically describe" the conversations to be seized. Even if additional orders had not extended the time, the privacy of a constitutionally protected area was breached for sixty days. Perhaps no characteristic of these orders better discloses their relation to the general warrant than this extended period of time. It is no answer to say that this is not the same as having "a policeman in the bedroom" for sixty days. The physical presence of the police is not necessary to accomplish the intrusion. As was said in *Boyd* v. *United States,* the principles with which we are dealing

> "apply to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . ." *supra* at 630.

Perhaps the requirement of particularized description can be accommodated to eavesdropping devices in other ways, *e.g.,* by requiring that all parties to the communication be identified, and (though it might be subject to abuse) requiring that the order specifically state the crime to which the conversations to be overheard and recorded are to relate. Conversations relating to other crimes, if over-

heard, could not be used in evidence in any proceeding.[11] (The obvious possibility of abuse lies in "leads" thus obtained. Though in theory evidence of other crimes derived from leads obtained during the eavesdrop should not be admissible under such a rationale, the problems of administering such a rule are legion.)

As this Court has so often observed, it is not the function of the Court to legislate. The selection of means by which the requirement of particularized description shall be met is appropriately left to the State and Federal legislatures. But the rights of citizens to the protection of the Fourth Amendment do not wait upon legislative success in finding a way to comply to the Fourth Amendment; rather, when legislation fails to meet the requirements of the Fourth Amendment, the Court must strike down the legislation. And, if statutes are needed to authorize police eavesdropping, those who enact and execute them must see to their compliance with the Constitution.

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[11] This Court in *Osborn* v. *United States*, 385 U. S. 323 (1966), alluded to this possible interpretation of the Fourth Amendment when dealing with electronic surveillance. See also Md. Code Ann., Art. 27, §125A (1957) (1966 Supp.), a statute which, among other provisions, requires a showing of necessity to use eavesdropping before the magistrate may authorize it.

## II.

**The eavesdropping violated the petitioner's rights of free speech.**

The First Amendment to the Constitution of the United States declares that "Congress shall make no law . . . abridging the freedom of speech." This applies equally to the States. *Thornhill* v. *Alabama,* 310 U. S. 88, 95 (1940).

No Constitutional right has suffered more frequent attack by governmental officials than the right of free speech; and in no other area has this Court so consistently turned back these attacks.

The dimensions of free speech, the most basic of our freedoms, have not been fully kenned, however. As is often the case, the nature and quality of a freedom are not understood until that freedom is endangered.

> "The guarantees for speech . . . are not the preserve of political expression or comment upon public affairs. . . ." *Time* v. *Hill,* —— U. S. ——, 87 S. Ct. 534, 542 (1967).

Freedom of speech means the right to say what one chooses to say to those to whom he would say it at a time and under circumstances of his own choosing.

> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech . . . bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges* v. *California,* 314 U. S. 252, 269 (1941).

Individual freedom of expression is not mere political debate. It is not limited to the public forum. First Amendment freedoms are not confined to those which fit a literal category of speech, petition or assembly. *N. A. A. C. P.* v. *Button,* 371 U. S. 415 (1963). The First Amendment creates "penumbral" freedoms of association, communication and individuality, *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 460 (1958), *Stanford* v. *Texas,* 379 U. S. 476, 485 (1965), *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539, 557 (1963), and a "zone of privacy" which gives that freedom "life and substance." *Griswold* v. *Connecticut,* 381 U. S. 479, 484 (1965).

Freedom of speech includes the freedom to hold oneself apart from the public scene and speak freely while speaking privately—to withdraw to a private place (one's own or another's) where the individual can ease the lines of his public face and posture, and without fear that he is being watched

> ". . . open his collar . . . and give vent to his own particular daydreams, his mutterings and snatches of crazy song, his bursts of obscenity and afflatus of glory." Cahn, *The Sense of Injustice,* 151 (1949).

"'Privacy' is not merely a personal predilection; it is an important functional requirement for the effective operation of social structure." Merton, *Social Theory and Social Structure,* 375 (1957); see also pp. 343-346.

A secretly installed microphone necessarily deprives those within its range of this freedom.

The New York statute purports to authorize such secret installations of microphones, upon issuance of a court order, if the court finds there are reasonable grounds to believe that evidence of crime may be obtained thereby. This statute, then, imposes a certain restraint on free speech.

The argument is frequently made that the police necessarily must be permitted to use these new espionage devices. Sometimes this is based on a supposed increased "crime rate." See *Kamisar, Public Safety* v. *Individual Liberties: Some "Facts" and "Theories,"* 53 J. of Crim. L. 171 (1962). Sometimes it is merely an argument that since these devices may be used by criminals they should be available to the police. At other times they are defended as nothing more than an improvement in detection devices, akin to a microscope or a faster prowl car.

Unfortunately, far more is involved than any of these characterizations admit. These devices, by their nature, take direct aim at that most cherished of our liberties, freedom of speech. The convenience to police administration of using secret microphones to overhear allegedly criminal conversations must be weighed against the loss of freedom all citizens, the innocent and the criminal, experience through the lack of certainty that they may choose their auditors.

In *On Lee* v. *United States,* 343 U. S. 747 (1952); *Lopez* v. *United States,* 373 U. S. 427, 439 (1963); *Hoffa* v. *United States,* 385 U. S. 293 (1966); and *Osborn* v. *United States,* 385 U. S. 323 (1966) this Court held that the police might obtain recordings of statements by use of a microphone hidden on the person of one whom the defendant knew was present. The Court was not presented with First Amendment arguments in those cases. Whether upon reconsidera-

tion in First Amendment terms these cases would be decided differently is not necessary to determine here. In those cases the persons whose statements were recorded knew of the presence of the person who carried the listening or recording apparatus. Even if those who speak must assume the risk, under the *On Lee-Osborn* line of cases, that the persons in whose presence they speak may divulge what is said to them, it does not follow that they must also risk that others, to whom they have not knowingly spoken, by secret listening devices will also have heard what is said. The method of eavesdropping used in the present case creates for every person everywhere the possibility that his statements are being listened to, no matter how faithfully those to whom he speaks keep his confidences. This tears at the very fabric of human relationships: the selection of those to whom one will communicate.[12]

In a broad sense the statute in question has a legitimate end: to assist law enforcement officers in the prevention of crime, and to bring to the bar of justice and punish those who engage in criminal conduct. Legitimate ends alone, however, will not justify legislation which impinges on the full exercise of the right of free speech. As this Court has said in *Thornhill* v. *Alabama,* 310 U. S. 88, 96 (1940):

> "It is imperative that, when the effective exercise of these [First Amendment] rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons ad-

[12] *Amicus* urges that police eavesdropping of the kind engaged in in the present case so violates values "implicit in the concept of ordered liberty", *Griswold* v. *Connecticut,* 381 U. S. 479, 500 (1965) (concurrence of Harlan, *J.*) that if judged in terms of Fourteenth Amendment standards it is unconstitutional.

vanced' in support of the challenged regulations [citing *Schneider* v. *State,* 308 U. S. 147, 161, 162]"

Further,

"[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960).

Accord: *Talley* v. *California,* 362 U. S. 60 (1960).

Section 813-a of the New York Code of Criminal Procedure purports to authorize this impingement on free speech any time the justice to whom application is made finds "reasonable ground to believe that evidence of crime may be thus obtained." Yet, as was said in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639 (1943), "[F]reedoms of speech [and other First Amendment freedoms] . . . are susceptible of restriction only to prevent *grave and immediate* danger to interests which the State may lawfully protect." (Emphasis added.)

Some might contend that any crime creates a "grave and immediate" danger to the public interest, thereby permitting the restraint of free speech that eavesdropping represents upon such a showing. This, however, ignores two vital points. First, restraining free speech, through eavesdropping or any other means, is permissible, if at all, only when there is a likelihood that a crime of great seriousness, such as kidnapping, murder or matters affect-

ing the national security, is involved. In the words of this Court in *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945):

> "[W]hatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in *public danger*, actual or impending. Only *the gravest abuses*, endangering paramount interests, give occasion for permissible limitation." (Emphasis added.)

This statute would permit eavesdropping without any such grave danger. Any crime will do. Second, the statute does not authorize eavesdropping to assuage a grave danger or prevent any crime at all. It merely seeks to authorize eavesdropping to *gather evidence* of crime. This is a total failure to provide a sufficient basis for trenching upon the Constitutional rights of citizens of the United States.

Undoubtedly, statutes can be drafted which, by the enumeration of purposes sufficiently related to vital public interests, and by the incorporation of the appropriate procedural safeguards of the Fourth Amendment and limitations on the use of the conversations overheard (e.g., see *Massiah* v. *United States*, 377 U. S. 201, 207 (1964)), can withstand the tests of the First, Fourth and Fifth Amendments.[13]

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[13] On February 6, 1967, the President, in his message to the Congress on crime, recommended enactment of legislation which would

> "outlaw all wiretapping, public and private, wherever and whenever it occurs, as well as all willful invasions of privacy by electronic devices such as radio transmitters and concealed microphones. *The only exceptions would cover those instances where the security of the Nation itself is at stake—and then only under the strictest safeguards.*" (H. R. Doc. No. 53, 113 Cong. R., H. 985, 989; S. 1517, 1520 (daily ed. Feb. 6, 1967).) (Emphasis added.)

Legislation of the kind proposed by the President would comport with the requirements of the First Amendment which are urged here.

The modern developments in electronic eavesdropping are well known. Any telephone can be quickly transformed into a microphone which transmits every sound in the room—even when the receiver is on the hook. Tiny microphones can be secreted behind, or even in, a picture, with a transmitter buried in the frame. As in this case, the innocent connector box and unused lines in the telephone cable in any house or room can convey the intimacies of that room to listening officials.[14]

When such eavesdropping is systematically engaged in by the police it has special impact upon free discussion. Since Orwell's *1984* men have feared the totalitarian impact of unremitting official invasion of privacy, which, it can be expected, will always be supported by arguments of necessity. For the historical example of Nazi Germany, see Shirer, *The Rise and Fall of the Third Reich,* 273 (1960). Official eavesdropping places the spectre of the government agent at the right hand of every individual everywhere—for there is no way of knowing when a conversation is being overheard. All who express their quiet aspirations, dreams, hopes, plans, foibles of personality

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[14] The First Amendment prohibits government officials from impinging on free speech. That private persons may also engage in this conduct (see generally Dash, Knowlton & Schwartz, *The Eavesdroppers* 339-379 (1959)), or other activities detrimental to the interests of a free society, does not allow State or Federal officials to disregard the Constitution.

—and conspiracies—risk that these are being shared with officials unknown to them or to their confidants.[15]

"[H]istorically the search and seizure power was used to suppress freedom of speech and of the press. . . ." *Lopez* v. *United States,* 373 U. S. 427, 470 (1963) (Brennan, *J.* dissenting). That the eavesdropping here considered is not intended to have the effect of suppressing free speech does not avoid that result. For, as Justice Brennan continues, "freedom of speech is undermined where people fear to speak unrestrainedly in what they suppose to be the privacy of home and office". *Ibid.*

That the protection afforded private speech will be abused—and may have been abused by this petitioner—is no basis for denying that protection. Undoubtedly no constitutional right has been exercised without some abuses. But the Constitution, and this Court in its prior decisions, have made it clear how the balance shall be struck when free speech is at issue.

To disregard the chilling effect these new electronic eavesdrop "weapons in the war on crime" have on innocent people is to allow free speech to become a casualty of that "war." It would avail society nothing if in an attempt to secure our citizens from crime we took from them the security of private free speech.

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[15] The extent of this official eavesdropping is not known. Statistics become available only rarely, when law enforcement officials can assemble a statistical argument in favor of police eavesdropping. That police eavesdropping is widespread cannot be doubted, however. In the related area of telephone wiretaps, in 1959 in New York City alone more than 500 telephones were tapped. *The Wiretapping Problem Today,* 3 Crim. Law Bull. 3 (1967). The number of persons whose conversations are overheard by tapping 500 telephones or offices for sixty days must reach the thousands.

## CONCLUSION

The evidence upon which petitioner's conviction is based was gathered by eavesdropping done in violation of the First, Fourth and Fifth Amendments. That conviction must be set aside.

### Motion for Leave to Argue

The petition for certiorari presented to this Court Fourth and Fifth Amendment questions only. As this brief indicates, *amicus* believes that equally important First Amendment questions relating to the rights of the petitioner and others are raised by the eavesdropping done in this case and permitted by New York's Statute. This brief also analyzes the Fourth and Fifth Amendment arguments in a way somewhat different from that provided in the petition for certiorari.

These matters have not been dealt with, and in the circumstances cannot be expected to be dealt with, by the parties. For this reason, it is believed that argument by *amicus* might provide assistance to the Court, not otherwise available, in its consideration of the case before the Court.

*Amicus*, therefore, requests leave to argue.

Respectfully submitted,

JOHN J. MCAVOY
14 Wall Street
New York, New York 10005
*Attorney for New York Civil Liberties Union, Amicus Curiae*

ALAN H. LEVINE
*Of Counsel*